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THE OUTLOOK FOR INTERNATIONAL LAW

OPENING ADDRESS OF ELIHU ROOT

President of the Society

The incidents of the great war now raging affect so seriously the very foundations of international law that there is for the moment but little satisfaction to the student of that science in discussing specific rules. Whether or not Sir Edward Carson went too far in his recent assertion that the law of nations has been destroyed, it is manifest that the structure has been rudely shaken. The barriers that statesmen and jurists have been constructing laboriously for three centuries to limit and direct the conduct of nations toward each other, in conformity to the standards of modern civilization, have proved too weak to confine the tremendous forces liberated by a conflict which involves almost the whole military power of the world and in which the destinies of nearly every civilized state outside the American continents are directly at stake.

The war began by a denial on the part of a very great Power that treaties are obligatory when it is no longer for the interest of either of the parties to observe them. The denial was followed by action supported by approximately one-half the military power of Europe and is apparently approved by a great number of learned students and teachers of international law, citizens of the countries supporting the view. This position is not an application of the doctrine *rebus sic stantibus* which justifies the termination of a treaty under circumstances not contemplated when the treaty was made so that it is no longer justly applicable to existing conditions. It is that under the very circumstances contemplated by the treaty and under the conditions for which the treaty was intended to provide the treaty is not obligatory as against the interest of the contracting party.

This situation naturally raises the question whether executory treaties will continue to be made if they are not to be binding, and requires consideration of a system of law under which no conventional obligations are recognized. The particular treaty which was thus set aside was declaratory of the general rule of international law respecting the inviolability of neutral territory; and the action which ignored the treaty also avowedly violated the rule of law, and the defense is that for such a violation of the law the present interest of a sovereign state is justification. It is plain that the application of

such a principle to a matter of major importance at the beginning of a long conflict must inevitably be followed by the setting aside of other rules as they are found to interfere with interest or convenience; and that has been the case during the present war. Many of the rules of law which the world has regarded as most firmly established have been completely and continuously disregarded, in the conduct of war, in dealing with the property and lives of civilian non-combatants on land and sea and in the treatment of neutrals. Alleged violations by one belligerent have been asserted to justify other violations by other belligerents. The art of war has been developed through the invention of new instruments of destruction and it is asserted that the changes of conditions thus produced make the old rules obsolete.

It is not my purpose at this time to discuss the right or wrong of these declarations and actions. Such a discussion would be quite inadmissible on the part of the presiding officer of this meeting. I am stating things which, whether right or wrong, have unquestionably happened, as bearing upon the branch of jurisprudence to which this Society is devoted. It seems that if the violation of law justifies other violations, then the law is destroyed and there is no law; that if the discovery of new ways of doing a thing prohibited justifies the doing of it, then there is no law to prohibit. The basis of such assertions really is the view that if a substantial belligerent interest for the injury of the enemy come in conflict with a rule of law, the rule must stand aside and the interest must prevail. If that be so it is not difficult to reach the conclusion that for the present, at all events, in all matters which affect the existing struggle, international law is greatly impaired. Nor can we find much encouragement to believe in the binding force of any rules upon nations which observe other rules only so far as their interest at the time prompts them. Conditions are always changing and a system of rules which cease to bind whenever conditions change should hardly be considered a system of law. It does not follow that nations can no longer discuss questions of right in their diplomatic intercourse, but upon such a basis it seems quite useless to appeal to the authority of rules already agreed upon as just and right and their compelling effect because they have been already agreed upon.

When we recall Mansfield's familiar description of international law as "founded upon justice, equity, convenience, the reason of the thing, and confirmed by long usage," we may well ask ourselves whether that general acceptance which is necessary to the establishment of a rule

of international law may be withdrawn by one or several nations and the rule be destroyed by that withdrawal so that the usage ceases and the whole subject to which it relates goes back to its original status as matter for new discussion as to what is just, equitable, convenient and reasonable?

When this war is ended, as it must be some time, and the foreign offices and judicial tribunals and publicists of the world resume the peaceable discussion of international rights and duties, they will certainly have to consider not merely what there is left of certain specific rules, but also the fundamental basis of obligation upon which all rules depend. The civilized world will have to determine whether what we call international law is to be continued as a mere code of etiquette or is to be a real body of laws imposing obligations much more definite and inevitable than they have been heretofore. It must be one thing or the other. Although foreign offices can still discuss what is fair and just and what is expedient and wise, they can not appeal to law for the decision of disputed questions unless the appeal rests upon an obligation to obey the law. What course will the nations follow?

Vague and uncertain as the future must be, there is some reason to think that after the terrible experience through which civilization is passing, there will be a tendency to strengthen rather than abandon the law of nations. Whatever the result may be, the world will have received a dreadful lesson of the evils of war. The sacrifice of millions of lives, millions homeless and in poverty, industry and commerce destroyed, overwhelming national debts—all will naturally produce a strong desire to do something that will prevent the same thing happening again.

While the war has exhibited the inadequacy of international law, so far as it has yet developed, to curb those governmental policies which aim to extend power at all costs, it has shown even more clearly that little reliance can be placed upon unrestrained human nature, subject to specific temptation, to commit forcible aggression in the pursuit of power and wealth. It has shown that where questions of conduct are to be determined under no constraint except the circumstances of the particular case, the acquired habits of civilization are weak as against the powerful, innate tendencies which survive from the countless centuries of man's struggle for existence against brutes and savage foes. The only means yet discovered by man to limit those tendencies consist in the establishment of law, the setting up of prin-

ciples of action and definite rules of conduct which can not be violated by the individual without injury to himself. That is the method by which the wrongs naturally flowing from individual impulse within the state have been confined to narrow limits. That analogy, difficult as it is to maintain in view of the differences between the individual who is subject to sovereignty and the nation which is itself sovereign, indicates the only method to which human experience points to avoid repeating the present experience of these years of war consistently with the independence of nations and the liberty of individuals. The *Pax Romana* was effective only because the world was subject to Rome. The Christian Church has been urging peace and good will among men for nineteen centuries, and still there is this war. Concerts of Europe and alliances and *ententes* and skillful balances of power all lead ultimately to war. Conciliation, good will, love of peace, human sympathy, are ineffective without institutions through which they can act. Only the possibility of establishing real restraint by law seems to remain to give effect to the undoubted will of the vast majority of mankind.

In the effort to arrange the affairs of the world so that they will not lead to another great catastrophe, men will therefore turn naturally towards the reestablishment and strengthening of the law of nations. How can that be done? How can the restraints of law be made more effective upon nations?

It is not difficult to suggest some things which will tend in that direction.

Laws to be obeyed must have sanctions behind them; that is to say, violations of them must be followed by punishment. That punishment must be caused by power superior to the law breaker; it can not consist merely in the possibility of being defeated in a conflict with an enemy; otherwise there would be no law as between the strong and the weak. Many states have grown so great that there is no power capable of imposing punishment upon them except the power of collective civilization outside of the offending state. Any exercise of that power must be based upon public opinion. It can not rest merely upon written agreements or upon the accidental dictates of particular interests. It must proceed from general, concurrent judgment and condemnation. When that exists, punishment may be inflicted either by the direct action of governments, forcible or otherwise, or by the terrible consequences which come upon a nation that finds itself with-

out respect or honor in the world and deprived of the confidence and good will necessary to the maintenance of intercourse. Without such an opinion behind it, no punishment of any kind can be imposed for the violation of international law.

For the formation of such a general opinion, however, questions of national conduct must be reduced to simple and definite form. Occasionally there is an act the character of which is so clear that mankind forms a judgment upon it readily and promptly, but in most cases it is easy for the wrongdoer to becloud the issue by assertion and argument and to raise a complicated and obscure controversy which confuses the judgment of the world. There is but one way to make general judgment possible in such cases. That is by bringing them to the decision of a competent court which will strip away the irrelevant, reject the false, and declare what the law requires or prohibits in the particular case. Such a court of international justice with a general obligation to submit all justiciable questions to its jurisdiction and to abide by its judgment is a primary requisite to any real restraint of law.

When we come to consider the working of an international court, however, we are forced to realize that the law itself is in many respects imperfect and uncertain. There is no legislature to make laws for nations. There is no body of judicial decisions having the effect of precedent to declare what international laws are. The process of making international law by usage and general acceptance has been necessarily so slow that it has not kept pace with the multiplying questions arising in the increasing intercourse of nations. In many fields of most fruitful controversy different nations hold tenaciously to different rules, as, for recent example, upon the right of expatriation, upon the doctrine of continuous voyages, upon the right to transfer merchant vessels after the outbreak of a war. Yet any attempt to maintain a court of international justice must fail unless there are laws for the court to administer. Without them the so-called court would be merely a group of men seeking to impose their personal opinions upon the states coming before them. The lack of an adequate system of law to be applied has been the chief obstacle to the development of a system of judicial settlement of international disputes. This is well illustrated by the history of the convention for an international prize court adopted by the Second Hague Conference. The Conference agreed to establish such a court and provided in Article 7 of the treaty that in the absence of special treaty provisions governing the case

presented "the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity." When the question of ratifying this treaty was presented to the Powers whose delegates had signed it, some of them awoke to the fact that upon many subjects most certain to call for the action of a court there was no general agreement as to what the rules of international law were, and that different nations had different ideas as to what justice and equity would require, and that each judge would naturally follow the views of his own country. Accordingly the Conference of London was called, and met in December, 1908. In that Conference the delegates of the principal maritime Powers came to agreement upon a series of questions and they embodied their agreement in the 71 articles of the Declaration of London. If that Declaration had been ratified by all the Powers in the Conference, it would doubtless have been accepted as a statement of the international law upon the subjects covered. But it was not ratified, and so the Prize Court Treaty remains ineffective because the necessary basis for the action of the court is wanting.

It is plain that in order to have real courts by which the legal rights of nations can be determined and the conduct of nations can be subjected to definite tests, there must be a settlement by agreement of old disputes as to what the law ought to be and provision for extending the law over fields which it does not now cover. One thing especially should be done in this direction. Law can not control national policy, and it is through the working of long-continued and persistent national policies that the present war has come. Against such policies all attempts at conciliation and good understanding and good will among the nations of Europe have been powerless. But law, if enforced, can control the external steps by which a nation seeks to follow a policy, and rules may be so framed that a policy of aggression can not be worked out except through open violations of law which will meet the protest and condemnation of the world at large, backed by whatever means shall have been devised for law enforcement.

There is another weakness of international law as a binding force which it appears to me can be avoided only by a radical change in the attitude of nations towards violations of the law.

We are all familiar with the distinction in the municipal law of all civilized countries, between private and public rights and the remedies for the protection or enforcement of them. Ordinary injuries and

breaches of contract are redressed only at the instance of the injured person, and other persons are not deemed entitled to interfere. It is no concern of theirs. On the other hand, certain flagrant wrongs the prevalence of which would threaten the order and security of the community are deemed to be everybody's business. If, for example, a man be robbed or assaulted, the injury is deemed not to be done to him alone, but to every member of the state by the breaking of the law against robbery or against violence. Every citizen is deemed to be injured by the breach of the law because the law is his protection, and if the law be violated with impunity, his protection will disappear. Accordingly, the government, which represents all its citizens, undertakes to punish such action even though the particular person against whom the injury was done may be content to go without redress. Up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it. There has been no general recognition of the right of other nations to object. There has been much international discussion of what the rules of law ought to be and the importance of observing them in the abstract, and there have been frequent interferences by third parties as a matter of policy upon the ground that specific, consequential injury to them might result from the breach; but, in general, states not directly affected by the particular injury complained of have not been deemed to have any right to be heard about it. It is only as disinterested mediators in the quarrels of others or as rendering good offices to others that they have been accustomed to speak of it at all. Until the First Hague Conference that form of interference was upon sufferance. In the Convention for the Pacific Settlement of International Disputes, concluded at that Conference, it was agreed that in case of serious trouble or conflict, before an appeal to arms the signatory Powers should have recourse to the good offices or mediation of foreign Powers, and Article 3 also provided:

Independent of this recourse, the signatory Powers recommend that one or more Powers strangers to the dispute should on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the states at variance. Powers strangers to the dispute have a right to offer good offices or mediation even during the course of hostilities. The exercise of this right can never be regarded by one or other of the parties in conflict as an unfriendly act.

These provisions are a considerable step towards a change in the theory of the relation of third Powers to an international controversy. They recognize such an independent interest in the prevention of conflict as to be the basis of a right of initiative of other Powers in an effort to bring about a settlement. It still remains under these provisions, however, that the other Powers assert no substantive right of their own. They are simply authorized to propose an interference in the quarrels of others to which they are deemed to be strangers. The enforcement of the rules of international law is thus left to the private initiative of the country appealing to those rules for protection, and the rest of the world has in theory and in practice no concern with the enforcement or non-enforcement of the rules.

If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation. When a controversy arises between two nations, other nations are indeed strangers to the dispute as to what the law requires in that controversy, but they can not really be strangers to a dispute as to whether the law which is applicable to the circumstances shall be observed or violated. Next to the preservation of national character, the most valuable possession of all peaceable nations, great and small, is the protection of those laws which constrain other nations to conduct based upon principles of justice and humanity. Without that protection, there is no safety for the small state, except in the shifting currents of policy among its great neighbors, and none for a great state, however peaceable and just may be its disposition, except in readiness for war. International laws violated with impunity must soon cease to exist, and every state has a direct interest in preventing those violations which, if permitted to continue, would destroy the law. Wherever in the world the laws which should protect the independence of nations, the inviolability of their territory, the lives and property of their citizens, are violated, all other nations have a right to protest against the breaking down of the law. Such a protest would not be an interference in the quarrels of others. It would be an assertion of the protesting nation's own right against the injury done to it by the destruction of the law upon which it relies for its

peace and security. What would follow such a protest must in each case depend upon the protesting nation's own judgment as to policy, upon the feeling of its people and the wisdom of its governing body. Whatever it does, if it does anything, will be done not as a stranger to a dispute or as an intermediary in the affairs of others, but in its own right for the protection of its own interest. Upon no other theory than this can the decisions of any court for the application of the law of nations be respected, or any league or concert or agreement among nations for the enforcement of peace by arms or otherwise be established, or any general opinion of mankind for the maintenance of law be effective.

Can any of these things be done? Can the law be strengthened and made effective? Imperfect and conflicting as is the information upon which conjecture must be based, I think there is ground for hope that from the horrors of violated law a stronger law may come. It was during the appalling crimes of the Thirty Years' War that Grotius wrote his *De Jure Belli ac Pacis* and the science of international law first took form and authority. The moral standards of the Thirty Years' War have returned again to Europe with the same dreadful and intolerable consequences. We may hope that there will be again a great new departure to escape destruction by subjecting the nations to the rule of law. The development and extension of international law has been obstructed by a multitude of jealousies and supposed interests of nations each refusing to consent to any rule unless it be made most favorable to itself in all possible future contingencies. The desire to have a law has not been strong enough to overcome the determination of each nation to have the law suited to its own special circumstances; but when this war is over the desire to have some law in order to prevent so far as possible a recurrence of the same dreadful experience may sweep away all these reluctances and schemes for advantage and lead to agreement where agreement has never yet been possible. It often happens that small differences and petty controversies are swept away by a great disaster, deep feeling, and a sense of common danger. If this be so, we can have an adequate law and a real court which will apply its principles to serious as well as petty controversies, and a real public opinion of the world responding to the duty of preserving the law inviolate. If there be such an opinion it will be enforced. I shall not now inquire into the specific means of enforcement, but the means can be found. It is only when opinion is

uncertain and divided or when it is sluggish and indifferent and acts too late that it fails of effect. During all the desperate struggles and emergencies of the great war, the conflicting nations from the beginning have been competing for the favorable judgment of the rest of the world with a solicitude which shows what a mighty power even now that opinion is.

Nor can we doubt that this will be a different world when peace comes. Universal mourning for the untimely dead, suffering and sacrifice, the triumph of patriotism over selfishness, the long dominance of deep and serious feeling, the purifying influences of self-devotion, will surely have changed the hearts of the nations, and much that is wise and noble and for the good of humanity may be possible that never was possible before.

Some of us believe that the hope of the world's progress lies in the spread and perfection of democratic self-government. It may be that out of the rack and welter of the great conflict may arise a general consciousness that it is the people who are to be considered, their rights and liberties to govern and be governed for themselves rather than rulers' ambitions and policies of aggrandizement. If that be so, our hopes will be realized, for autocracy can protect itself by arbitrary power, but the people can protect themselves only by the rule of law.

The PRESIDENT. Next upon our program is an address by Hon. John Bassett Moore, formerly Counsellor for the Department of State, on "The relation of international law to national law in American countries," and I take great pleasure in presenting him.

THE RELATION OF INTERNATIONAL LAW TO NATIONAL LAW IN THE AMERICAN REPUBLICS

ADDRESS OF DR. JOHN BASSETT MOORE

The present address is not concerned with the question whether the law of nations, or international law, is to be placed in the same legal category as national or municipal law—a question I discussed elsewhere a year ago.¹ It relates simply to the attitude of the authorities, legislative, administrative and judicial, of the American countries towards international law and its enforcement. It may be superfluous to say

¹Law and Organization: Presidential Address at the Eleventh Annual Meeting of the American Political Science Association, Chicago, Dec., 1914. *The American Political Science Review*, February, 1915.